

WASHINGTON, D.C. 20505

30 MAR 1976

Honorable Peter W. Rodino, Jr., Chairman  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to offer our views on H.R. 12048, a bill "Amending Title 5 of the United States Code to improve agency rulemaking by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes."

Subsections (b) through (e) of section 553 of the Administrative Procedure Act establish certain procedures to be followed by Federal agencies in rulemaking. These procedures include advance public notice of rulemaking, opportunity to submit views, and delayed effectiveness of rules. Subsection (a) of section 553 makes these procedures inapplicable "to the extent that there is involved a military or foreign affairs function of the United States." H.R. 12048 would amend subsection (a) and exempt instead "a matter pertaining to a military or foreign affairs function of the United States that is (A) specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and (B) is in fact properly classified pursuant to such Executive order."

The foreign intelligence responsibilities performed by the Central Intelligence Agency are fully excluded from the requirements of section 553 because they fall within the existing general exemption for military or foreign affairs functions. It is our position that foreign intelligence functions should continue to be generally excluded from public rulemaking procedures, and for this reason we are opposed to narrowing the existing exemption, as proposed in H.R. 12048.

The existing exemption fully protects sensitive intelligence matters from public disclosure and, therefore, achieves society's interest in preserving the necessary secrecy of certain foreign intelligence activities. This would not necessarily be accomplished under the exemption proposed in H.R. 12048 because the responsibilities of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure are an explicit statutory direction (50 U.S.C. 403) and are not based upon



Executive order, as required in the bill. Therefore, by limiting the exemption to matters classified under Executive order, H.R. 12048 raises a potential conflict with the Director's statutory authorities. In addition, the "properly classified" standard proposed in H.R. 12048 could invite litigation in the course of which sensitive information could be compromised.

There is an additional consideration which militates against removing the exemption from public rulemaking procedures for the foreign intelligence function. This involves striking a balance between the desirability of public participation in decisions which directly affect the public and society's interest in conducting the Government's business efficiently and, in the foreign intelligence field, discreetly. Rules involving foreign intelligence functions have such a minimal public impact, if any, that, on balance, the public's interest would be best served by preserving the current exemption from the rulemaking procedures. The Central Intelligence Agency is not engaged in economic, social or other kinds of regulation which affect the public; nor is it a policy making agency in the field of foreign relations. The Agency was established under the National Security Act of 1947 to correlate and evaluate foreign intelligence and to perform other intelligence-related duties at the direction of the National Security Council.

One of the purposes of Executive Order 11905, issued by the President on 19 February 1976, is "to assure compliance with law in the management and direction of intelligence agencies and departments of the national government." We believe that this Executive order is responsive to the interests underlying the proposed change in the current exemption in section 553.

For the foregoing reasons, this Agency opposes favorable consideration of H.R. 12048 in its present form.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

SIGNED

George L. Cary  
Legislative Counsel

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